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Wasli bin Mohd Said v Asmi bin Andi Hadji Yakin @ Andi Yakin (substituting Andiyakin bin Mapasere, deceased)

B HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K-22–51 OF 2004
RAVINTHRAN J
1 DECEMBER 2014

C *Contract — Loan — Agreement — Failure to adhere to settlement agreement — Allegation borrower took loan from plaintiff — Whether money given for safekeeping — Whether alleged borrower understood language and nature of agreement — Principle of non est factum — Whether available to plaintiff*

D The plaintiff initiated the present action for recovery of RM12m allegedly lent to one Andiyakin ('the original first defendant') and his wife, the second defendant. The plaintiff commenced this action against both defendants in 2004. After the alleged failure to adhere to the terms of a settlement agreement E on the part of the defendants, the plaintiff filed judgment in default which was later set aside by the Court of Appeal. Andiyakin passed away and his daughter was substituted as the first defendant. Summary judgment was granted against the first defendant. The summary judgment was later set aside and the action was ordered to go for trial. The defence was that Andiyakin did not take a loan F of RM12m from the plaintiff. Instead, he was given RM6m by the plaintiff for safekeeping. It was contended that Andiyakin had fully returned the sum of RM6m and had also paid RM2m which was the plaintiff's share of the profits generated from the investment of RM6m. The defendants pleaded *non est factum*. The issues that arose were, inter alia, whether the plaintiff had lent G RM12m to the defendants; and whether the settlement agreement was valid since it was argued that Andiyakin could not understand it.

Held, allowing the claim:

H (1) The substituted first defendant denied that Andiyakin had even signed the loan agreement. The first defendant could not now claim that the loan agreement was only a charge document. Even if the first defendant had pleaded that it was a charge document, it was clearly adverted in the 'Recitals' that the plaintiff had agreed to grant a loan to Andiyakin as per the schedule. There was also no reason for Andiyakin to sign the I settlement agreement unless he had accepted a loan in the sum of RM12m from the plaintiff. The loan agreement, together with the proposal letter and the settlement agreement constituted irrefutable evidence that Andiyakin had accepted a loan of RM12m from the plaintiff (see para 13).

(2) The defence of *non est factum* could not succeed in this case. Firstly, the plea of *non est factum* cannot be availed by anyone who simply says that he did not understand or could not read what he had signed. Otherwise, anyone who changes his mind after signing a legal document could raise this plea to escape from a lawfully contracted bargain. Andiyakin was a matured man of 67 and a businessman to boot. It was quite ridiculous to now say that he did sign the loan agreement but did not understand the contents as he was misled into thinking that it was about money deposited for safekeeping. Andiyakin was after all not a simpleton. He was a businessman and even carried the title of 'Datuk'. As he was a businessman who had previously secured contracts, he ought to have known the importance of understanding the terms of a contract. It must also be noted that the proposal letter that was addressed by Andiyakin to the plaintiff was written in Malay. The late Andiyakin did not take reasonable precautions to enable him or rather the substituted first defendant to invoke the plea of *non est factum* (see paras 15 & 18).

[Bahasa Malaysia summary

Plaintif memulakan tindakan ini bagi mendapat semula wang sejumlah RM12 juta yang didakwa dipinjamkan kepada seorang yang bernama Andiyakin ('defendan pertama yang asal') dan isterinya, defendan kedua. Plaintif memulakan tindakan ini terhadap kedua-dua defendan pada tahun 2004. Selepas kegagalan yang didakwa untuk mematuhi terma-terma perjanjian penyelesaian oleh pihak defendan-defendan, plaintif memfailkan penghakiman ingkar yang kemudiannya diketepikan oleh Mahkamah Rayuan. Andiyakin meninggal dunia dan anak perempuannya digantikan sebagai defendan pertama. Penghakiman ringkas diberikan terhadap defendan pertama. Penghakiman ringkas kemudiannya diketepikan dan tindakan diperintahkan untuk perbicaraan. Pembelaan adalah bahawa Andiyakin tidak mengambil pinjaman sebanyak RM12 juta daripada plaintif. Sebaliknya, dia diberikan RM6 juta oleh plaintif untuk disimpan dengan selamat. Ia dihujahkan bahawa Andiyakin telah memulangkan jumlah sebanyak RM6 juta tersebut dan juga telah membayar RM2 juta yang mana adalah syer keuntungan plaintif yang dijanakan daripada pelaburan sebanyak RM6 juta tersebut. Defendan-defendan memplid *non est factum*. Isu-isu yang berbangkit adalah, antara lain, sama ada plaintif telah meminjamkan RM12 juta tersebut kepada defendan-defendan; dan sama ada perjanjian penyelesaian adalah sah ia dihujahkan bahawa Andiyakin tidak memahaminya.

Diputuskan, membenarkan tuntutan:

(1) Defendan pertama yang digantikan menafikan bahawa Andiyakin telah menandatangani perjanjian pinjaman. Defendan pertama sekarang ini tidak dapat mendakwa bahawa perjanjian pinjaman hanya caj dokumen. Jikapun defendan pertama telah memplid yang ia adalah caj dokumen, ia

jelas dirujuk di dalam 'Recitals' yang plaintif bersetuju untuk memberi pinjaman kepada Andiyakin seperti jadual tersebut. Juga tidak terdapat alasan untuk Andiyakin menandatangani perjanjian penyelesaian kecuali dia telah menerima pinjman sejumlah RM12 juta daripada plaintif. Perjanjian pinjaman, bersama dengan surat cadangan dan perjanjian penyelesaian membentuk keterangan yang tidak boleh disangkal bahawa Andiyakin telah menerima pinjaman sebanyak RM12 juta daripada plaintif (lihat perenggan 13).

(2) Pembelaan *non est factum* tidak berjaya dalam kes ini. Pertama, pli *non est factum* tidak boleh diguna oleh sesiapapun yang hanya menyatakan bahawa dia tidak memahami atau tidak boleh membaca apa yang ditandatanganinya. Jika tidak, sesiapa yang menukar fikirannya selepas menandatangani dokumen undang-undang boleh membangkitkan pli ini untuk melepaskan diri daripada kontrak tawaran sah. Andiyakin adalah seorang lelaki matang berumur 67 dan serta ahli perniagaan. Ia adalah tidak munasabah sekarang ini untuk menyatakan yang dia menandatangani perjanjian pinjaman tersebut tetapi tidak memahami isinya kerana dia ditipu sehingga dia menerima bahawa ia mengenai wang didepositkan untuk disimpan dengan selamat. Andiyakin bukanlah seorang yang mudah ditipu. Dia adalah ahli perniagaan dan bergelar Datuk. Memandangkan dia adalah ahli perniagaan yang telah dahulunya mendapat kontrak, dia patut mengetahui pentingnya untuk memahami terma-terma kontrak. Ia juga mesti diambil kira bahawa surat cadangan yang ditujukan oleh Andiyakin kepada plaintif ditulis dalam Bahasa Melayu. Allahyarham Andiyakin tidak mengambil langkah yang berjaga-jaga untuk membolehkan dia atau defendan pertama yang diganti untuk membangkitkan pli *non est factum* (lihat perenggan 15 & 18).]

Notes

For cases on agreement, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 5972–5974.

Cases referred to

Chong Pak Kwan @ Chong Shiu Fai v Kong Chung Loi @ Kong Sung Loi & Others [2002] MLJU 435, HC (refd)

Foo Tock Lin v Piong Kew [1963] MLJ 67, CA (refd)

L'Estrange v F Graucob Ltd [1934] 2 KB 394 (refd)

Polygram Records Sdn Bhd v The Search & Anor [1994] 3 MLJ 127, HC (refd)

Saunders (Executrix of Will of Gallie) v Anglia Building Society [1971] AC 1004, HL (refd)

Siah v Tengku Nong [1964] MLJ 43, FC (refd)

Soon Kok Tiang and others v DBS Bank Ltd and another matter [2012] 1 SLR 397, CA (refd)

Legislation referred to

Evidence Act 1950 ss 73, 92

Lawrence Thien of (Chau & Thien) for the plaintiff.
Baldev Singh (Baldev Gan & Assoc) for the defendants.

Ravinthran J:

INTRODUCTION

[1] The plaintiff's action is for recovery of RM12m allegedly lent to one Andiyakin bin Mapasere ('Andiyakin') (the original first defendant) and his wife, the second defendant. The plaintiff commenced this action against both defendants in 2004. After the alleged failure to adhere to the terms of a settlement agreement on the part of the defendants, the plaintiff filed judgment in default on 13 July 2005. The judgment in default was later set aside by the Court of Appeal. The said Andiyakin passed away on 22 December 2006 and his daughter was substituted as the first defendant. On 21 January 2012, the summary judgment was granted against the first defendant. The summary judgment was later set aside and the action was ordered to go for trial. The defence was that Andiyakin did not take a loan of RM12m from the plaintiff. Instead, he was given RM6m by the plaintiff for safekeeping. It was contended that Andiyakin had fully returned the sum of RM6m and had also paid RM2m which was the plaintiff's share of the profits generated from the investment of RM6m. At the outset of the trial, counsel for the plaintiff placed on record that the plaintiff did not serve the writ on the second defendant and are not proceeding against her.

CASE FOR THE PLAINTIFF

[2] The plaintiff testified on his own behalf and called another witness. The plaintiff testified that on 1 October 2001, he signed an agreement with Andiyakin to lend RM12m to Andiyakin and his wife (second defendant). Andiyakin and his wife agreed to repay the loan in one lump sum before 30 April 2002 together with the stipulated interest. As security, Andiyakin executed a charge over six parcels of land. One Awang bin Ahmad ('PW2') was the witness to the signature of the plaintiff whereas Asmar bin Andi Yakin ('DW1') was the witness to the signature of the borrowers. DW1 is the son of Andiyakin and his wife. According to the plaintiff, Andiyakin and his wife defaulted in repaying the loan of RM12m. In a letter dated 5 July 2003, Andiyakin proposed to repay the loan by transferring the six parcels of land which were valued at RM10m to him. However, he failed to do so. Consequently, the plaintiff instituted the instant suit on 20 April 2004. Upon service of the writ, Andiyakin made another proposal to settle the loan by way of four instalments. This proposal culminated in a settlement agreement that

was signed by the plaintiff and Andiyakin. It was signed in the presence of PW2 and DW1. The settlement agreement was undated but the first payment was to commence on 10 May 2004. This settlement agreement was stamped on 13 January 2012. Andiyakin defaulted and the plaintiff obtained judgment in default on 13 July 2005. This judgment was set aside by the Court of Appeal. The High Court later granted summary judgment in favour of the plaintiff. The summary judgment was set aside by the Court of Appeal in May of 2013 and ordered the action to proceed to full trial. The plaintiff said that the said Andiyakin had admitted taking the loan in the three documents that he signed, ie the loan agreement dated 1 October 2010, the proposal letter dated 5 July 2003 and the undated settlement agreement. In the statement of defence it was denied that Andiyakin signed the loan agreement. However, the plaintiff said that there was no denial in the affidavits filed at the interlocutory stage. The plaintiff said that there was no allegation in Andiyakin's affidavit in support at the interlocutory stage about the alleged defence that the plaintiff merely deposited RM6m for safekeeping with him. The plaintiff also said that the proposal letter could not have been signed under duress by Andiyakin for fear of losing contracts with Borneo Samudera Sdn Bhd of which the plaintiff was the general manager. This is because the plaintiff had retired before the letter was signed by Andiyakin. As for the settlement agreement, the plaintiff said that it was explained in Malay to Andiyakin by PW2 before he signed it. The plaintiff said that the schedule of payments under the settlement agreement was as follows:

> Under the said Settlement Agreement in which reference was made to the present suit, Andiyakin Bin Mapasere had agreed to settle the said Loan by four (4) installments, namely:
>
> (i) RM4.0 million (10.5.2004);
>
> (ii) RM2.0 million (1.7.2004);
>
> (iii) RM4.0 million (1.9.2004); and
>
> (iv) RM2.0 million by year 2006
>
> with interest of 1% per month in consideration of me keeping in abeyance the above suit.

[3] The plaintiff said that Andiyakin had only paid a total sum of RM8m by 31 May 2005, leaving a balance principal sum of RM4m plus agreed interest thereon. The plaintiff is now claiming the balance of RM4m out of the RM12m that he allegedly loaned to Andiyakin and his wife with interest as prayed in the statement of claim.

[4] The only other witness for the plaintiff was Awang bin Ahmad ('PW2'). He is a friend of the plaintiff. He was present when the loan agreement and the settlement agreement were signed by the plaintiff and Andiyakin. He said that

he witnessed the plaintiff signing the loan agreement. When Andiyakin and his wife signed the loan agreement, their signatures were witnessed by the son, Asmar bin Andi Yakin (DW1). As for the settlement agreement, PW2 said that he prepared it at the request of the plaintiff. He explained and translated its contents to Andiyakin in Malay. The settlement agreement was signed at the Sutera Harbour Golf and Country Club by the plaintiff and Andiyakin. PW2 and Asmar bin Andi Yakin (DW1) were present at the signing.

THE DEFENCE

[5] In the statement of defence, it is denied that Andiyakin received a loan of RM12m or that he signed the loan agreement. It is pleaded that the plaintiff delivered RM6m in three batches of RM2m for 'safekeeping'. Subsequently the plaintiff requested Andiyakin to invest the RM6m and pay him a small share of the profits. It is pleaded that subsequently, Andiyakin repaid the entire RM6m and also paid an additional RM2m which represented the first defendant's share of the profits generated from the investment.

[6] Andiyakin passed away even before the statement of defence was filed. The daughter of Andiyakin was substituted as the defendant in his place. However, she did not testify in court. Only the son of Andiyakin, the said Asmar bin Andi Yakin (DW1) testified for the substituted first defendant. The summary of his witness statement is as follows. The plaintiff and Andiyakin have been friends since 1986. The plaintiff was the general manager of Borneo Samudera Sdn Bhd. Andiyakin's company was one the contractors of Borneo Samudera Sdn Bhd. DW1 even said that some contracts were awarded on the basis of 'kick backs' to the plaintiff. However, I expunged the claim pertaining to 'kick backs' as it was not pleaded. DW1 said the plaintiff used his friendship with his father to give him RM6m for safekeeping. DW1 said he has personal knowledge of the conversation his father had with the plaintiff on this matter. DW1 said he collected the money from the plaintiff. His evidence is as follows:

> I remembered collecting the total sum of RM6 Million from the Plaintiff in 3 batches of RM2 Million each. I collected the monies in Kota Kinabalu from the Plaintiff and drove to Sandakan to hand the monies to my late Father. On each occasion the Plaintiff handed to me the RM2 Million cash. In transporting the monies for the Plaintiff I would on each occasion change my vehicle in Ranau town for security reasons. Such was the trust between parties that on each occasion the RM2 Million was handed to me without any document being signed.

[7] The plaintiff later asked Andiyakin to invest the money and give him a small share of the profits. Only later, the plaintiff wanted interest in the form of profits. DW1 said as follows:

> Subsequently for reasons only known to him the Plaintiff wanted my late Father to pay to the Plaintiff profits in the form of interest on the RM6 Million. From the

> discussion the Plaintiff was seeking profit at the rate of 1% to 3% per month on the RM6 Million sum. By this time my late Father had already invested and used up the said cash.

[8] DW1 said that Andiyakin was afraid of 'offending' the plaintiff and losing 'contract works'. He agreed to pay whatever profit derived from the investments made from the said RM6m. Andiyakin also agreed to sign some documents that the plaintiff requested, ie the proposal letter and the settlement agreement. DW1 said Andiyakin is a Bugis from Sulawesi and therefore could not understand written Malay or English. He said his father returned the sum of RM6m plus RM2m in profits that were generated by investment to the plaintiff. In respect of the loan agreement, DW1 denied that he witnessed his parents signing it. DW1 agreed signing the loan agreement as a witness but said that his parents were not present at that time. He said it was undated and his parents had not signed the document at that time. DW1 did not understand the loan agreement as it was in English but he was told to sign it. The contents of the loan agreement were not explained to DW1. The plaintiff told DW1 that he would bring the document to his father in Sandakan to sign. DW1 also said in the witness statement that the loan agreement was a charge document. However, this averment was expunged on the ground that the defendant did not plead in the statement of defence that the loan agreement was a charge document. DW1 said the loan agreement is questionable because his father could not recall signing it. The document was never translated to him. In the course of his dealings with Andiyakin, the plaintiff never explained the documents that he asked him to sign. He said that purported loan agreement is inconsistent with the proposal letter dated 5 July 2003. This is because based on the loan agreement, the plaintiff could have foreclosed the parcels of land that belonged to his father. DW1 said as follows:

> The said document is inconsistent with the alleged letter dated 5.7.2003. If my late Father did sign the purported loan document dated 1.10.2001 in October 2001, then it is not logical why he should latter in July 2003 again propose to surrender the same parcels of lands as the Plaintiff would allegedly have the right to foreclose on those parcels of lands. The Plaintiff's conduct in failing to exercise his alleged right to foreclose on those lands identified in the Loan document supports my contention that there was never any loan given as alleged and the Loan document is not a genuine Loan agreement or charge.

[9] He said the settlement agreement was also not translated and explained to his father. He said Andiyakin was made to believe that it was about the said RM6m that had been entrusted to him for safekeeping. He said that the '1% monthly interest' notation was only inserted after the document was executed. Finally, he said that the monies deposited by the plaintiff with his father were the ill-gotten gains that were the subject of criminal charges that the plaintiff

faced. However, on the application of the counsel for the plaintiff, I expunged this statement as it was not pleaded.

ISSUES

[10] The parties did not submit agreed common issues for determination. Furthermore, counsel for the plaintiff has objected to some of the issues raised by counsel for the defendant on the ground that they were not pleaded. I shall first address the main issues in the pleadings before considering subsidiary issues. The plaintiff's case is hinged on a loan transaction whereby the plaintiff had lent RM12m to the defendants. After the plaintiff filed the writ of summons, the parties entered into the settlement agreement whereby the defendants were required to pay RM10m by 31 May 2004. The defendants allegedly failed to do so as they only paid RM8m by that date. The plaintiff's case is that the settlement agreement provided that the plaintiff can proceed under the instant writ action in the event of default of the settlement agreement. In the premises, the main issues would be whether the plaintiff had lent RM12m to the defendants. The second main issue would be whether the settlement agreement was valid. The other issues would be as follows. Counsel for the defendant submitted that the claim was premature because the settlement agreement was only signed after issuance of the writ. He argued that the settlement agreement had 'superseded' the loan agreement. He also submitted that in reality there was no loan of RM12m given by the plaintiff to the defendants. The plaintiff only deposited RM6m for safekeeping. He submitted that the loan agreement was a 'charge' document. These and other issues would be dealt with together with the main issues.

LOAN OF RM12M

[11] The case of the plaintiff is that he had given a loan of RM12m to the defendants and that this fact is supported by the loan agreement dated 1 October 2001, the proposal letter dated 5 July 2003 and the undated settlement agreement. The plaintiff testified that he signed the loan agreement dated 1 October 2001 with Andiyakin and his wife. He said Awang bin Ahmad (PW2) and Asmar bin Andi Yakin (DW1) were the witnesses when the parties signed the agreement. He said when the defendants failed to repay the loan by 30 April 2002, Andiyakin wrote a letter proposing to transfer six parcels of land which are valued at RM10m. This letter was written in Malay. However, Andiyakin failed to transfer the said lands to the plaintiff. The plaintiff then proceeded to file the writ in question. The parties then entered into the settlement agreement that I mentioned earlier. The settlement agreement was also witnessed by Awang bin Ahmad (PW2) and Asmar bin Andi Yakin (DW1). The plaintiff and PW2 told the court that Andiyakin signed the loan agreement and the settlement agreement. DW1 did not deny that Andiyakin signed the loan agreement and the settlement agreement although in para 1 of

the statement of defence, it is denied that Andiyakin signed the loan agreement. DW1 only said that his parents did not sign the loan agreement at the same time as when he signed it as a witness. This allegation was never raised by Andiyakin in his previous affidavits at the interlocutory stage. He only said that he could not 'recall' signing it. Be that as it may, as counsel for plaintiff pointed out, whether DW1 signed the loan agreement at the same time as his parents is non-issue as it is a private loan agreement. It is not a document that the law requires attestation by a third party in order to be valid. The more important point is that the DW1 did not deny that his father and mother signed the loan agreement. He was only at pains to emphasise that they did not understand the loan agreement as it was in English. DW1 said that he himself did not understand the loan agreement. As for the proposal letter and the settlement agreement, DW1 said that his father had agreed to sign the said documents because of the 'request' of the plaintiff. It must be noted that in para 8 of the statement of defence, there is also a denial that Andiyakin had signed the settlement agreement. However, DW1 had taken the position that Andiyakin had signed the above documents but that he was not aware of its contents. As I said earlier, plaintiff and his witness, PW2 affirmatively told the court that Andiyakin had signed both documents. Furthermore, the signature of Andiyakin on the loan agreement, proposal letter and the settlement agreement are all similar. It is a fact that the court can take notice by comparing the signatures under s 73 of the Evidence Act 1950. Thus as Andiyakin had passed away and his son, DW1 did not deny that he signed the documents, I accept the evidence of the plaintiff and find that Andiyakin signed the loan agreement and the settlement agreement. DW1 also did not deny that Andiyakin had signed the proposal letter. He conceded as follows during cross-examination:

> PUT: That your parents not only did not protest the Loan Agreement but your father proposed by his letter dated 5.7.2003 to settle part of the loan by transfer of lands to the Plaintiff. Agree?
>
> A: I agree.
>
> PUT: That your father made no protest after making his proposal dated 5.7.2003. Agree?
>
> A: I agree

[12] The loan agreement despite being titled 'Loan Agreement' refers to the capacity of the parties as lender and chargor. However, the 'Recitals' refers to the fact that the chargor had 'agreed to grant a loan' which is stated as RM12m in the schedule. It reads as follows:

> A.The Chargor(s) has requested and the Lender has agreed to grant a loan up to the aggregate principal amount described in Section 4(a) of the First Schedule herein (hereinafter called 'the loan' which expression shall where the context so permits include any part or balance thereof).

B. In consideration of the Lender agreeing at the Chargor(s)' request to grant and make available and continue to grant and make available the Loan, the Chargor(s) are executing this Charge in favour of the Lender in respect of the said Property to secure the repayment and payment on demand of the Indebtedness upon the terms and conditions hereinafter contained.

[13] DW1 said in his witness statement that the loan agreement was a charge document only. However, on the application of counsel for the plaintiff, I expunged this statement as it was never pleaded in the statement of claim that the loan agreement was a charge document. As I said earlier, in the statement of claim, the substituted first defendant denied that Andiyakin had even signed the loan agreement. In the premises, the first defendant cannot now claim that the loan agreement is only a charge document. Even if the first defendant has pleaded that it was charge document, as I said earlier, it is clearly adverted in the 'Recitals' that the plaintiff had agreed to grant a loan to Andiyakin as per the schedule. There is also no reason for Andiyakin to sign the settlement agreement unless he had accepted a loan in the sum of RM12m from the plaintiff. In the premises, the 'Loan Agreement' together with the proposal letter and the settlement agreement constitute irrefragable evidence that Andiyakin had accepted a loan RM12m from the plaintiff. I shall now consider the argument of counsel for the defendant that Andiyakin could not have understood the contents of the said documents.

PLEA OF NON EST FACTUM

[14] The allegation that Andiyakin did not understand the contents of the loan agreement, the proposal letter and the settlement agreement is an essential cornerstone of the evidence of DW1. He said that his father had rudimentary education in Indonesia before he came to Sabah. He said that his father did not know any English and could not read written Malay. Counsel for the defendant cited the plea of *non est factum* in his written submission. The loan agreement and the settlement agreement are in English. Counsel for the defendant submitted that Andiyakin had thought all along that he was signing documents pertaining to the alleged deposit of RM6m for safekeeping and the sharing of profits generated from it and that he did not know that he was signing a loan agreement or a settlement agreement. A successful plea of *non est factum* enables a party to avoid an agreement if that party was permanently or temporarily unable, through no fault of its own, to have any real understanding of the purport of the document, irrespective of whether this inability arises from defective education or any incapacity (see *Saunders (Executrix of Will of Gallie) v Anglia Building Society* [1971] AC 1004). In *Polygram Records Sdn Bhd v The Search & Anor* [1994] 3 MLJ 127 which was cited by counsel for the plaintiff, the court quoted the old case of *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 and said as follows:

A There is no principle of law which states that where a party does not fully understand certain terms of a contract, the contract may be vitiated. The general principle of law, of course, is that a party who signs a written contract is bound by the terms of the contract, except in the limited cases where fraud, undue influence, or misrepresentation may be established. This rule is so strict that even if a party to
B a contract has not read the contents of a contract, he is held to be bound by its terms. In the leading case of *L'Estrange v F Graucob* [1934] 2 KB 394, Scrutton LJ pronounced (at p 403):

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is
C wholly immaterial whether he has read the document or not.

One exceptional circumstance under which a party to a written contract may seek to set it aside is on the grounds of *non est factum*, which by itself is usually difficult to establish.

D

[15] However, in my opinion, the defence of *non est factum* cannot succeed in this case. Firstly, the plea of *non est factum* cannot be availed by anyone who simply says that he did not understand or could not read what he had signed. Otherwise, anyone who changes his mind after signing a legal document could
E raise this plea to escape from a lawfully contracted bargain. Lord Wilberforce in *Saunders (Executrix of Will of Gallie) v Anglia Building Society* at the House of Lords expressed the dilemma of the courts when faced with this plea and cautioned as follows:

> As to persons who are illiterate, or blind, or lacking in understanding, the law is in
F a dilemma. On the one hand, the law is traditionally, and rightly, ready to relieve them against hardship and imposition. On the other hand, regard has to be paid to the position of innocent third parties who cannot be expected, and often would have no means, to know the condition or status of the signer. I do not think that a defined solution can be provided for all cases. The law ought, in my opinion, to give
G relief if satisfied that consent was truly lacking but will require of signers even in this class that they act responsibly and carefully according to their circumstances in putting their signature to legal documents.

[16] Lord Reid in the same case said as follows:

H

> There must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify it is being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances.

I

[17] At the Court of Appeal, Lord Denning had even said that that a man of full age and understanding who can read and write cannot be allowed to repudiate his signature to a document which he knows will have legal consequences if he signs it without reading it. Although the above statement was qualified by the House of Lords, it is plain that the Law Lords thought that

mere carelessness or disregard of reasonable precautions cannot entitle one to plead this defence. In the more recent Singapore case of *Soon Kok Tiang and others v DBS Bank Ltd and another matter* [2012] 1 SLR 397 which was cited by counsel for the plaintiff, Chan Sek Keong CJ issued the following useful reminder and advice in the concluding paragraph of his judgment in respect of the recurrent claim that one did not understand the terms of a written contract in question:

> In view of our decision in this appeal, we think it apposite and timely to remind the general public that under the law of contract, a person who signs a contract which is set out in a language he is not familiar with or whose terms he may not understand is nonetheless bound by the terms of that contract. Illiteracy, whether linguistic, financial or general, does not enable a contracting party to avoid a contract whose terms he has expressly agreed to be bound by. The principle of caveat emptor applies equally to literates and illiterates in such circumstances.

[18] In the instant case, Andiyakin was a matured man of 67 and a businessman to boot. DW1 had told the court that his father's company had procured lucrative contracts from Borneo Samudera Sdn Bhd of which the plaintiff was the general manager. Andiyakin in his previous affidavits had merely stated that he did not 'recall' signing the loan agreement. Therefore, it is quite ridiculous for his son, DW1, to now say that his father did sign the loan agreement but did not understand the contents as he was misled into thinking that it was about money deposited for safekeeping. Even, if Andiyakin was alive and had testified that he did not understand the loan agreement, the fair question that would have been asked of him is why he did not take the reasonable precaution of obtaining the services of an independent person to explain the contents of the loan agreement and settlement agreement to him. Andiyakin was after all not a simpleton. He was a businessman and even carried the title of 'Datuk'. As he was a businessman who had previously secured contracts, he ought to have known the importance of understanding the terms of a contract. In the premises, the minimum precaution that he could have taken is to ask an independent person to explain the loan agreement to him. Therefore, the explanation advanced on his behalf by his son that he could not have understood the loan agreement or the settlement agreement is simply not acceptable. It must also be noted that the proposal letter that was addressed by Andiyakin to the plaintiff is written in Malay. DW1 said that his father could not understand Malay as he had only two or three years of rudimentary education in Indonesia. It is difficult to believe that Andiyakin who had lived in Sabah for a longtime and even become a 'Datuk' here could not read the simple Malay in which the proposal letter is written. If fact, Andiyakin had made some notes in Malay on the proposal letter and had initialed the same. However, even if it were true that he could not read Malay, with minimal effort he could have easily secured the services of someone who could have explained it to him. Therefore, I am satisfied that the late Andiyakin did not take

reasonable precautions to enable him or rather the substituted first defendant to invoke the plea of *non est factum*. To hold otherwise would enable scores of businessmen to repudiate bargains they have knowingly contracted on the ground that the document in question is written in a language in which they are not proficient.

PROBATIVE VALUE OF DW1'S EVIDENCE

[19] Andiyakin passed away long before the trial. DW1 testified that his father did not know what he signed. DW1 also implied that his father had signed documents because he felt pressured by the plaintiff. These allegations go to the state of mind of Andiyakin when he executed the said documents. However, the contention of DW1 does not seem plausible at all for this reason. While Andiyakin was alive and was affirming affidavits at the interlocutory stage, he never mentioned that DW1 was involved in his dealings with the plaintiff with respect to the transaction in question. It is also significant that DW1 did not file any affidavit in the interlocutory applications to support the application of the first defendant to set aside the judgment in default. Andiyakin also did not take any legal action to nullify the said agreements on the ground that he was misled or coerced. He did not lodge any police report after signing the said documents about any alleged coercion on the part of the plaintiff. In the premises, the evidence of DW1 at the trial about why his father could have signed the said documents must be given very little weight. Furthermore, whatever Andiyakin told his son about the circumstances in which he signed the documents can only be verified by Andiyakin or the plaintiff. Since Andiyakin has passed away, DW1's testimony about what he heard from his father can only, at best, constitute proof of what he heard but not whether it is true. In the premises, the documents relied on by the plaintiff, ie the loan agreement, settlement agreement and proposal letter executed by Andiyakin assume added significance and must be given proper weight. The case of *Chong Pak Kwan @ Chong Shiu Fai v Kong Chung Loi @ Kong Sung Loi & Others* [2002] MLJU 435 cited by counsel for the plaintiff is on point. In that case, the plaintiff died before the trial and court did not accept the evidence of his personal representative as he only related what he had been told. The court said as follows:

> The demise of the plaintiff hindered the court from hearing his version of the event. The testimony of PW1 is nothing more than what he claimed to have been told by the plaintiff before his death. At best his evidence therefore is that such statements were made and not as to their truth. And thus reliance upon the documents tendered becomes invaluable in so far as the version of the Plaintiff is concerned.

[20] Similarly, in the instant case, if the defence of *non est factum* or coercion is to have any chance at all, only the evidence of Andiyakin can establish it. Since Andiyakin had passed away, the evidence of DW1 that Andiyakin could

not have understood the documents or that he was pressured by the plaintiff to sign various documents has to be disregarded on the ground that it has low probative value.

WHETHER CLAIM UNDER LOAN AGREEMENT AND SETTLEMENT AGREEMENT IS BAD?

[21] Counsel for the defendant raised the following arguments at the submission stage. When the writ action was filed and served, the settlement agreement was not in existence as yet. Counsel for the defendant submitted that for the said reason, the writ action based on breach of the settlement agreement is premature as the settlement agreement did not exist at the date of issuance of the writ. This argument goes to the root of the claim of the plaintiff. However, the first defendant never specifically pleaded this defence in the statement of defence. In the premises, I am of the view that the first defendant should not be allowed to raise it at the submission stage. Curiously, counsel for the defendant also raised the converse argument that the claim based on the loan agreement is bad because the settlement agreement 'superseded' the loan agreement. The first defendant did not plead this issue as well. Therefore, the first defendant should not be permitted to raise this argument now. Even if it were otherwise, I find that there is no merit in the supersession argument. The settlement agreement is a document that contains simple terms. It refers to the instant suit and provides a schedule of payment for the then outstanding RM12m with 1% interest per month. It also provides that the plaintiff is at liberty to 'reactivate' the instant suit in the event the terms of the settlement agreement are breached. The basis of the suit is the loan transaction. Therefore, it is crystal clear that the settlement agreement had merely provided for the further admission of Andiyakin in respect of his liability to pay the plaintiff and had set out a timetable to effect payments. It did not 'supersede' the loan agreement. It had even preserved the right of the plaintiff to 'reactivate' the instant suit which is based on the loan agreement. Finally it must be noted that the plaintiff is relying on all the said three documents, ie the loan agreement, the proposal letter and the settlement agreement as evidence that the defendants had accepted a loan of RM12m from him.

JOINT LIABILITY

[22] Counsel for the defendant submitted that the liability under the loan agreement is a joint liability. He argued that since the plaintiff did not proceed against the second defendant and did not serve the writ on her, the claim to make the first defendant jointly and severally liable is bad in law. This issue was not pleaded in the statement of defence as well and therefore should not be raised now. I also find there is no merit in this argument. Clause 1.02(c) of the loan agreement reads as follows:

In this Charge unless there is something in the subject or context inconsistent with such construction or unless it is otherwise expressly provided:

(a) ...

(b) ...

(c) where there are two (2) or more persons or parties included or comprised in the expression the 'Chargor(s)' all agreements covenants terms stipulations and undertakings expressed to be made by and on the part of the Chargor(s) shall be deemed to be made by or binding upon such persons or parties *jointly and severally* ... . (Emphasis added.)

[23] In the premises, although the loan agreement was executed by Andiyakin and his wife, the plaintiff is entitled to proceed against the substituted first defendant, 'jointly and severally'. It must also be noted that Andiyakin had assumed sole liability to repay the loan in the proposal letter and the settlement agreement which had been pleaded in the statement of claim and tendered in evidence. I therefore find no merit in this argument.

WHETHER THE PLAINTIFF IS CLAIMING AN EXCESSIVE AMOUNT?

[24] The argument of counsel for the defendant on this issue is as follows. He submitted that in the proposal letter, Andiyakin offered to transfer lands worth RM10m to the plaintiff. The plaintiff agreed that he has received RM8m in cash from Andiyakin. Therefore, counsel for the defendant argued that the cash of RM8m clearly exceeds the balance of RM2m that is due under the proposal letter. There is clearly no merit in the above argument as there is no evidence that the said lands worth RM10m were transferred to the plaintiff. The plaintiff said as follows in his evidence:

Q: You were asked that once you have accepted the transfer of 6 pieces of land in payment of RM10 million, you are no longer entitled to the cash payment of RM10 million. Was the 6 pieces of land transferred to you pursuant to the offer of Andiyakin?

A: No.

[25] Therefore, Andiyakin did not make good on his promise contained in the proposal letter. It must be noted that no evidence was tendered to controvert the assertion of the plaintiff. Therefore, the argument that the sum of RM8m paid to the plaintiff exceeded the balance of RM2m is without merit.

WHETHER TRANSACTION WAS ABOUT DEPOSIT OF TRUST MONIES?

[26] DW1 told the court that the plaintiff had only deposited a sum of RM6m with his father for safekeeping and that in reality there was no loan transaction. Counsel for the defendant submitted that the loan agreement, the Proposal Letter and the settlement agreement are 'sham documents'. As I said earlier, DW1's evidence has low probative value for the reason that Andiyakin never said in his earlier affidavits at the interlocutory stage that his son had knowledge of the transactions. Even if it were otherwise, I find that counsel for the plaintiff is correct in his argument that s 92 of the Evidence Act 1950 bars this defence. The loan agreement in no uncertain terms refers to the loan transaction between the plaintiff and Andiyakin in the recitals. There is no mention of any 'trust monies' given for safekeeping. Section 92 excludes evidence which contradict, vary, add to or subtract from any of the terms of a contract in writing, except in any of the situations spelled out in the provisos (see *Foo Tock Lin v Piong Kew* [1963] MLJ 67 and *Siah v Tengku Nong* [1964] MLJ 43). In *Siah v Tengku Nong* which was cited by counsel for the plaintiff, the then Federal Court said as follows:

> First, the agreement relates to a specified piece of land and gives a description of it. The only thing is that it does not specify which particular acre forms the subject matter of the transaction, but I do not think that this matters, because it is perfectly lawful and commonplace to buy and sell undivided shares in land. In any event this point was never pleaded by the defendant who was represented.
>
> Secondly, the terms of an agreement having been proved by its production, normally no oral evidence such as that given by the plaintiff's second witness may be admitted to vary or contradict them except where fraud is alleged, as here. That the learned Judge found as a fact that the transaction was a loan shows that in his view fraud on the plaintiff's part the burden of proving which lies on the defendant, has been proved; but remembering the degree of proof that is required to establish fraud it is clear that no court can reasonably hold on the evidence so far disclosed in this case that fraud has been established.

[27] Furthermore, Andiyakin never took the position at the outset after being served with the writ of summons that the said documents where 'sham documents'. Instead, he said he could not 'recall' signing the loan agreement. His son, DW1 did not produce any evidence apart from making a bare statement that plaintiff deposited monies for safekeeping with his father. DW1 also did not tender any evidence that would bring the instant case within the exclusion clauses of s 92. In the premises, the bare assertion that the plaintiff deposited only RM6m with Andiyakin for safekeeping is without any merit.

SOURCE OF THE FUNDS OF RM12M

[28] The argument of counsel for the defendant is that the plaintiff had been vague about the source of the loan that he gave to Andiyakin. He said that the income tax returns of the plaintiff did not reflect the said earnings. He submitted that the plaintiff had only said vaguely that he 'sold his shares' to obtain that money. In my opinion, this issue is not a relevant issue in this trial. As pointed out by counsel for the plaintiff, the first defendant never made an issue of the source of the funds when it was claimed that the actual amount deposited as trust money was only RM6m. In fact, there is no income tax declaration by the plaintiff either that he earned RM6m during the relevant period. The plaintiff as general manager of Borneo Samudera Sdn Bhd earned about RM25,000 a month. It was also never made an issue earlier at the interlocutory stage and is clearly an afterthought. In any event, this trial is about a loan transaction and not money laundering activities.

INTEREST

[29] Counsel for the defendant submitted that Andiyakin never agreed to the interest rate of 1% per month that was inserted in the settlement agreement after he had signed it. In the writ of summons, the plaintiff claimed 1% monthly interest on the overdue sum. Therefore, counsel for the defendant submitted that the claim for interest is bad. I find no merit in this argument. As I said earlier, it is undisputed that Andiyakin did not adhere to the terms of the settlement agreement which provides for a repayment schedule and preserves the right of the plaintiff to maintain the instant suit. The loan agreement in s 4(b) of the First Schedule provides for charging of 1% monthly interest. As the loan agreement was signed before the settlement agreement, even if it is accepted that the interest rate was inserted at a later date on the settlement agreement, the plaintiff is still entitled to charge interest as per the terms of the loan agreement. I therefore find no merit in the argument of counsel for the defendant.

CONCLUSION

[30] For all the above reasons, I shall grant judgment for the plaintiff against the first defendant as follows:

(a) the balance principal sum of loan of RM4m;

(b) interest of RM4,174,186.98 being interest on loan of RM12m at the rate of 1% per month (compounded monthly) from the month of October 2001–March 2004;

(c) interest of RM7,484,857.53 being interest on loan of RM4m at the rate

of 1% per month (compounded monthly) from the month of June 2005–March 2014;

(d) further interest from April 2005 to date of judgment at rate of 1% per month on outstanding balance;

(e) post judgment interest of 5%pa from date of judgment; and

(f) the first defendant is ordered to pay costs of RM30,000 to the plaintiff.

Claim allowed.

Reported by Afiq Mohamad